

NO. 09-35818

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOHN DOE #1, an individual, JOHN
DOE #2, an individual, and PROTECT
MARRIAGE WASHINGTON,

Plaintiffs/Appellees,

v.

SAM REED, in his official capacity as
Secretary of State of Washington,
BRENDA GALARZA, in her official
capacity as Public Records Officer for
the Secretary of State of Washington,

Defendants/Appellants.

APPELLANTS' REPLY TO
APPELLEES' OPPOSITION
TO EMERGENCY MOTION
TO STAY OR EXPEDITE

A. The Court Should Stay The Preliminary Injunction Issued By The District Court

Appellees, Protect Marriage Washington and the two John Does (Sponsors) make two arguments why the Court should not stay the preliminary injunction issued by the District Court. First, the Sponsors claim that: "Granting the relief sought by the State in this Motion [allowing the names of petition signers to be released to the public] will immediately end the case." Appellees' Opp'n at 2.

This claim is not accurate because the preliminary injunction prohibits the Secretary of State from releasing any referendum petitions to the public. It is not limited to Referendum 71 petitions. Therefore, even if the Referendum 71 petitions are release, the District Court must still consider the Sponsors' claim that Washington's Public Records Act is unconstitutional as applied to any referendum petition and that a permanent injunction should be entered.

The Sponsors had two claims for relief. Count I was to "[d]eclare Wash. Rev. Code § 42.56.070 unconstitutional to the extent it requires the Secretary of State to make referendum petitions submitted to the Secretary of State's office available to the public" and "[e]njoin Defendants from making referendum petitions available to the public pursuant to the Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.*, or otherwise[.]" Verified Complaint for Declaratory and Injunctive Relief (Complaint) at. 10.¹ Count II was, "[in] the alternative, the Public Records Act is unconstitutional as applied to the Referendum 71 petition[s] because there is a reasonable probability that the signatories of the Referendum 71 petition[s] will be subject to threats, harassment, and reprisals." *Id.* The Sponsors' Count I is a facial challenge,

¹ The Sponsors' Complaint is attached as Appendix A.

claiming that the release of any petitions would be unconstitutional. Count II is an as-applied challenge applying only to the Referendum 71 petitions.

The Sponsors drew the same distinction in the relief they sought in the motion for a preliminary injunction. The Sponsors' requested a preliminary injunction to: "(1) Enjoin Defendants from making referendum petitions available to the public pursuant to the Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.*, or otherwise; (2) Enjoin Defendants from making the Referendum 71 petition or any petition related to the definition of marriage or the rights and responsibilities that should be accorded to same-sex couples, available the public pursuant to the Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.*, or otherwise." Motion for Temporary Restraining Order and Preliminary Injunction (Motion) at 1.²

The District Court ruled in favor of the Sponsors on Count I. Order Granting Plaintiffs' Motion for Preliminary Injunction (Order) at 16 ("At this time, the Court need not reach the merits of Plaintiffs' second claim for relief."). Thus, the preliminary injunction is not limited to the Referendum 71 petitions. Therefore, contrary to the Sponsors' claim, staying the preliminary injunction will not end this case.

² The Sponsors' motion is attached as Appendix B.

Second, the Sponsors rehash their arguments below, urging that they support denying a stay of the preliminary injunction. Appellants do not intend to follow suit by repeating prior arguments. Rather, Appellants make two points concerning the Sponsors' opposition to Appellants' motion to stay the preliminary injunction.

First, even though anonymous speech is the linchpin of the Sponsors' claim that the Public Records Act violates the First Amendment, the Sponsors do not try to refute (and cannot refute) the fact that signers of referendum petitions are not engaged in anonymous speech. Rather, the Sponsors try to avoid this fundamental deficiency in their claim by erroneously suggesting that Appellants assert referendum signers have waived their right to engage in anonymous speech. Opp'n at 12. Appellants have not asserted waiver. Waiver necessarily assumes that referendum signers engage in anonymous speech; this is precisely the opposite of Appellants' argument. Simply stated, a person who puts his name and address on a referendum petition that is submitted to the government, and who discloses his name and address on the petition to a host of private parties, is not engaged in anonymous speech. Release of referendum petitions under the Public Records Act, therefore, does

not implicate anonymous speech. The Sponsors offer nothing to refute this void in their anonymous speech claim.

Second, the Sponsors erroneously equate the District Court's identification of the appropriate standards to be considered for preliminary injunctive relief, with correct application of those standards. Opp'n at 8. In fact, as a direct consequence of its erroneous determination that the Public Records Act requires disclosure of anonymous speech, the District Court misapplied each of the standards.

B. If The Court Does Not Stay The Preliminary Injunction, This Appeal Should Be Expedited

If the Court does not stay the preliminary injunction, this appeal should be expedited so that it can be resolved before the general election on November 3, 2009. The Sponsors argue that the appeal should not be expedited. Importantly, the Sponsors' do not argue that they would be unable to comply with an expedited briefing schedule, or that the Court would be unable to resolve the case quickly. The arguments the Sponsors do offer are not well taken.

The Sponsors argue that providing information to the voters before the November 3rd election is not important because the State's interest in an informed electorate "is limited to identifying those 'persons *financially*

supporting or opposing a...ballot measure[sic].’ *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1032 (9th Cir. 2009).” Opp’n at 22 (emphasis and ellipsis in original, footnote omitted). Contrary to the Sponsors’ claim, *Canyon Ferry* does not stand for the proposition that the State only has an informational interest in letting the public know who financially supports a measure. *Canyon Ferry* involved Montana’s campaign finance law, so naturally, the court discussed the state’s interest in information about who financially supported a measure. *Canyon Ferry*, 556 F.3d at 1032 (“It is essential to keep in mind, however, just what information the State has determined that the public needs. The information to be disclosed is the identity of persons *financially* supporting or opposing a candidate or ballot proposition.”). *Id.*

The Sponsors’ Referendum 71 petitions demonstrate the importance of knowing who supports a measure apart from financial contribution. The back of the Referendum 71 petitions contains the pictures and short statements of support for the measure from three Washington State Legislators, a pastor, and Larry Stickney, the President of the Washington Values Alliance. The Sponsors of Referendum 71 clearly thought that voters would sign the

Referendum 71 petitions because of the individuals supporting it. The voters deserve the same information before the November 3rd election.

The Sponsors also recite the fact that the Secretary of State was not present at the hearing in which the District Court granted the temporary restraining order. It is true that the Secretary of State was not represented at the hearing. However, the Sponsors do not tell the whole story. On Tuesday, July 28, 2009, the Attorney General's Office received a telephone call from counsel for the Sponsors stating that they were going into federal district court to get a temporary restraining order. The Sponsors did not serve any pleadings. On July 28, the Sponsors appeared in the District Court to get the temporary restraining order, but the Court refused to grant it until the action had been served. The judge set a hearing on the temporary restraining order for the next day, July 29.

On July 29, at 12:06 p.m. (by our date stamp), the Attorney General's Office was served in Olympia, Washington, with over 500 pages of material that included 58 John Doe Declarations. On July 29, at 2:20 p.m. (according to the minute entry on the Court's docket), the hearing on the temporary restraining order was held in Tacoma, Washington. Under the circumstances, it would have made little sense for Appellants' counsel to spend valuable

preparation time driving to Tacoma to advise the District Court that on less than two and one-half hours' notice, exclusive of travel time, Appellants could not meaningfully respond to the motion. Instead, Appellants immediately began to review and the 500 plus pages of Sponsors' pleadings.

Otherwise, the Sponsors suggest that expedited review should not be granted because Appellants were unwilling to compress their opportunity to review the massive amount of material filed by the Sponsors, develop the record, and brief the Sponsors' preliminary injunction motion in the District Court in a matter of ten days. While such a course certainly would have served the Sponsors' interests, it would not have served the State's interests. Sponsors cite no authority for the unsound view that Appellants were required to sacrifice the opportunity to have adequate time to brief and present the Appellants' case in the District Court as a prerequisite to expedited review.

Moreover, even if the Secretary of State had appeared at the hearing on the temporary restraining order, and taken every action the Sponsors claim should have been taken, the Secretary of State would still be seeking expedited review so this case can be resolved before the November 3rd election.

C. CONCLUSION

The Court should stay the preliminary injunction. If the Court denies the motion for a stay, the Court should expedite this appeal.

RESPECTFULLY SUBMITTED this 21st day of September, 2009.

ROBERT M. MCKENNA
Attorney General

/s/ William B. Collins
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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2009, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ William B. Collins
William B. Collins

APPENDIX A

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8 **UNITED STATES DISTRICT COURT**
9 **WESTERN DISTRICT OF WASHINGTON**
10 **SEATTLE DIVISION**

11 JOHN DOE #1, an individual, JOHN DOE #2,
12 an individual, and PROTECT MARRIAGE
WASHINGTON,

13 Plaintiffs,

14 vs.

15 SAM REED, in his official capacity as
16 Secretary of State of Washington, DEBRA
GALARZA, in her official capacity as Public
Records Officer for the Secretary of State of
Washington,

17 Defendants.
18

No.

**VERIFIED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

19
20 John Doe #1, an individual, John Doe #2, an individual, and Protect Marriage Washington
21 complain and allege as follows:

22 **INTRODUCTION**

23 **1.** This is a civil action for declaratory and injunctive relief arising under the First and
24 Fourteenth Amendments to the Constitution of the United States. This case concerns the
25 constitutionality of the Washington Public Records Act, Wash. Rev. Code § 42.56.001, *et seq.*,
26 as it applies to the public release of referenda petitions submitted to the Secretary of State of
27 Washington.
28

1 2. The rights of citizens to peaceably assemble and petition the government for redress of
2 grievances are among the fundamental rights protected by the Bill of Rights. Inherent within
3 these rights is the right of individuals to engage in anonymous speech, speech that has “played an
4 important role in the progress of mankind.” *McIntyre v. Ohio Elections Commission*, 514 U.S.
5 334, 341 (1995); *id.* at 343 n. 6 (citing the Federalist Papers as perhaps the most famous example
6 of anonymous writing in our nation’s political history). And as the Supreme Court has
7 recognized, there is nothing inherently suspect with an individual wanting to keep his or her
8 support for an issue private. *Id.* at 341-42 (“The decision in favor of anonymity may be motivated
9 by fear of economic or official retaliation, by concern about social ostracism, or merely by a
10 desire to preserve as much of one’s privacy as possible.”)

11 3. The public release of a referendum petition containing the names and addresses of over
12 138,500 Washington residents pursuant to Washington’s Public Records Act threatens to
13 undermine the First Amendment’s goal of encouraging “uninhibited, robust, and wide-open”
14 debate, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). By publicly disseminating the
15 names of individuals signing a referendum petition, individuals and organizations hope to make
16 it personally, economically, and politically unpopular to advocate a position that would seek to
17 preserve the sanctity of marriage, as traditionally defined as between one man and one woman.

18 4. Given the sensitive First Amendment rights at issue, Plaintiffs complain that the State of
19 Washington lacks a compelling interest sufficient to justify the public disclosure of referendum
20 petitions.

21 5. In the alternative, Plaintiffs complain that, if the State possesses a compelling state
22 interest, the Public Records Act is unconstitutional because there is a reasonable probability of
23 threats, harassment, and reprisals if the names and addresses of the petition signers are publicly
24 released.

25 6. Given the nature of the rights asserted, the failure to obtain injunctive relief from this
26 Court will result in immediate and irreparable injury to Plaintiffs.

JURISDICTION AND VENUE

7. This case raises questions under the Constitution of the United States and 42 U.S.C. § 1983, and thus this Court has jurisdiction over all claims for relief pursuant to 28 U.S.C. §§ 1331 and 1343(a).

8. The Western District of Washington is the proper venue for this case pursuant to 28 U.S.C. § 1391(b) because Defendants Reed and Galarza reside in this district, Plaintiff Protect Marriage Washington has its principle place of business in this district, and Plaintiffs John Doe #1 and John Doe #2 reside in Washington.

PARTIES

9. Plaintiff John Doe #1 is an individual and resident of Stevens County, Washington. Plaintiff John Doe #1 signed the Referendum 71 petition.

10. Plaintiff John Doe #2 is an individual and resident of Cowlitz County, Washington. Plaintiff John Doe #2 signed the Referendum 71 petition.

11. Plaintiff Protect Marriage Washington is a State Political Committee organized pursuant to Wash. Rev. Code § 42.17.040, to place Referendum 71 on the ballot and to encourage citizens to reject SB 5688, and has its principal place of business in Snohomish County, Washington.

12. Defendant Sam Reed is the Secretary of State of Washington. In his official capacity, Defendant Reed is responsible for receiving referendum petitions pursuant to Wash. Rev. Code § 29A.72.010 and for making public records available pursuant to the Public Records Act. Wash. Rev. Code § 42.56.001 *et seq.*

13. Defendant Brenda Galarza is the Public Records Officer for Defendant Reed. Upon information and belief, Defendant Galarza has been appointed by Defendant Reed, pursuant to Wash. Rev. Code § 42.56.580, to serve as the point of contact for members of the public when requesting disclosure of public records from the Secretary of State and to oversee the agency's compliance with the Public Records Act.

FACTS

14. Pursuant to Wash. Const. art. II, § 1(b), the referendum power is reserved by the people of Washington State.

15. The referendum power grants Washington citizens the right to call a referendum on any act, bill, law, or any part thereof passed by the legislature by submitting a petition to that effect to the Secretary of State. Wash. Const. art. II, § 1(b).

16. If a petition submitted to the Secretary of State contains at least four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the referendum petition, the effective date of the act, bill, law, or any part thereof is delayed until the electorate has an opportunity to vote on the referendum. Wash. Const. art. II, §§ 1(b) & (d).

17. An act, bill, law, or any part thereof, subject to a referendum, becomes law only if a majority of the votes cast are in favor of the referendum. Wash. Const. art. II, § 1(d).

18. On January 28, 2009, Washington State Senator Ed Murray introduced Senate Bill 5688 (“SB 5688”), a bill designed to expand the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners to be equivalent to those of married spouses. The legislation is commonly referred to simply as the “everything but marriage” domestic partnership bill.

19. On March 10, 2009, after various amendments, the Washington Senate passed Second Substitute Senate Bill 5688.

20. On April 15, 2009, the Washington House of Representatives passed Second Substitute Senate Bill 5688.

21. On or about May 4, 2009, Larry Stickney filed notice with the Secretary of State of his intent to circulate a referendum petition related to SB 5688. The Secretary of State assigned the title “Referendum 71.”

22. On or about May 13, 2009, Protect Marriage Washington organized as a State Political Committee pursuant to Wash. Rev. Code § 42.17.040.

23. Protect Marriage Washington’s purpose is to circulate a referendum petition on SB 5688 and to encourage voters to reject SB 5688.

1 **24.** Larry Stickney is the campaign manager of Protect Marriage Washington.

2 **25.** As the campaign manager for Protect Marriage Washington, Larry Stickney has
3 received a large number of emails from people who disagree with his position on marriage. True
4 and correct copies of some of these emails are attached to this Complaint as Exhibit 1. Some of
5 these emails are threatening and/or harassing. For example, one threatening email states: "You
6 better stay off the olympic peninsula. . it's a very dangerous place filled with people who hate
7 racists, gay bashers and anyone who doesn't believe in equality. Fair is fair." Another email
8 threatened the signers of the Referendum 71 petition with boycotts: "We shall boycott the
9 businesses of EVERYONE who signs your odious, bigoted petition." Other emails are offensive
10 and harassing: "Dear God fearing hate mongerers - . . . Maybe you just want to feel a cock in
11 your ass and hate yourself for it. Whatever. Praise Jeebus you retarded fuckholes!"

12 **26.** These threats have caused Larry Stickney a great deal of worry for his safety and the
13 safety of his family.

14 **27.** Early in the campaign to circulate the Referendum 71 petition, Larry Stickney made his
15 children sleep in an interior living room because he feared for their safety if they slept in their
16 own bedrooms.

17 **28.** In late June an individual was seen taking pictures of Larry Stickney's home while his
18 daughter played outside.

19 **29.** Larry Stickney filed a complaint with his local sheriff because of threats on a local blog.
20 One of the blog posts stated: "If Larry Stickney can do 'legal' things that harm OUR family, why
21 can't we go to Arlington, WA to harm his family?" A true and correct copy of Larry Stickney's
22 email correspondence with the Sheriff is attached to the Complaint as Exhibit 2.

23 **30.** Larry Stickney has also received threatening and harassing phone calls from individuals
24 in the middle of the night. For example, shortly after Referendum 71 was presented to the
25 Secretary of State on May 4, 2009, he received a phone call at 2:00 a.m. from a woman who
26 sounded frantic and deranged, and who said various obscene and vile things to him.

27 **31.** Since Referendum 71 was submitted to the Secretary of State for review on May 4,
28 2009, numerous news sources and blogs have focused their attention on intimate details of Larry

1 Stickney's personal life. For example, "The Stranger," an alternative Seattle newspaper,
 2 published details of his divorce that occurred fifteen years ago. A true and correct copy of that
 3 article is attached to this Complaint as Exhibit 3.

4 **32.** On May 18, 2009, Washington Governor Christine Gregoire signed Engrossed Second
 5 Substitute Senate Bill 5688.¹

6 **33.** Upon information and belief, the group WhoSigned.org threatened to publish the names
 7 of every individual signing the Referendum 71 petition on or about June 1, 2009.

8 **34.** Upon information and belief, Plaintiffs believe that WhoSigned.org intends to make an
 9 end-run around Wash. Rev. Code § 29A.72.230 (prohibiting proponents and opponents of a
 10 referendum petition from making records of the names, addresses, and other information on the
 11 petition during the verification and canvass process), by requesting copies of the petitions
 12 submitted pursuant to Washington's Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.*

13 **35.** On or about June 2, 2009, Dave Ammons, communications director for Defendant
 14 Reed, posted a blog entry on the Secretary of State's website suggesting that the Secretary of
 15 State intended to comply with WhoSigned.org's Public Records request. A true and correct copy
 16 of that blog post is attached hereto as Exhibit 4.

17 **36.** On or about June 9, 2009, the group KnowThyNeighbor.org issued a joint press release
 18 with WhoSigned.org again threatening to publish the names on the internet of every individual
 19 signing the Referendum 71 petition.

20 **37.** KnowThyNeighbor.org and WhoSigned.org have publicly stated that they intend to
 21 publish the names of petition signers on the internet and to make the names searchable.

22 **38.** KnowThyNeighbor.org and WhoSigned.org have stated that the purpose of placing the
 23 names on the internet is to encourage individuals to contact any person who signed the
 24 Referendum 71 petition.

25 **39.** The news media has widely reported that KnowThyNeighbor.org and WhoSigned.org
 26 intend to publish the names of any individual who signs the petition on the internet.

27
 28 ¹ The enacted legislation subject to the referendum petition will be referred to simply as SB 5688.

1 **40.** On Saturday, July 25, 2009, Protect Marriage Washington submitted the petition with
2 over 138,500 signatures to Defendant Reed, exceeding the number of signatures necessary to
3 place a referendum question on the ballot.

4 **41.** By filing the petition, Plaintiffs have delayed the effective date of SB 5688. If the
5 Secretary of State determines that petition contains a sufficient number of valid signatures, SB
6 5688 will become law only if a majority of Washington residents vote to “approve” the bill at the
7 next general election.

8 **42.** Defendant Reed is responsible for verifying and canvassing the signatures on the
9 Referendum 71 petition. Proponents and opponents of Referendum 71 are permitted to have
10 representatives present during the verification and canvass process. The statute prohibits
11 proponents and opponents who are observing the verification and canvass process from making
12 any records of the names, addresses, or other information contained on the petitions. Wash. Rev.
13 Code § 29A.72.230.

14 **43.** Plaintiff Protect Marriage Washington, and its officers and directors have been subject
15 to threats, harassment, and reprisals while attempting to gather the signatures necessary to place
16 Referendum 71 on the ballot.

17 **44.** Petition circulators have been subjected to threats, harassment, and reprisals as they
18 attempted to obtain the signatures necessary to place Referendum 71 on the ballot.

19 **45.** Defendant Galarza has stated that referendum petitions are “public records” within the
20 meaning of Wash. Rev. Code § 42.56.10(2) and are subject to public disclosure pursuant to
21 Wash. Rev. Code § 42.56.070.

22 **46.** Given the threats, harassment, and reprisals directed at Plaintiff Protect Marriage
23 Washington, petition signers, and supporters of a traditional definition of marriage across the
24 country, there is a reasonable probability that the disclosure of those who signed the Referendum
25 71 petition, including disclosure of the addresses of petition signers, will result in threats,
26 harassment, and reprisals.

1 47. The threatened publication of the petitions has created an environment that discourages
2 Washington citizens from exercising their First Amendment rights to participate in the
3 referendum process.

4 48. The threatened publication of the petitions discourages individuals and organizations
5 from exercising their First Amendment rights to support the effort to encourage Washington
6 citizens to reject SB 5688.

7 49. Plaintiffs have suffered, or will suffer, irreparable harm if the requested relief is not
8 granted.

9 **LEGAL ARGUMENTS COMMON TO PLAINTIFFS' CLAIMS**

10 50. "The First Amendment is the pillar of a profound national commitment to the principle
11 that debate on public issues should be uninhibited, robust, and wide-open" *Mont. Right to*
12 *Life v. Eddlemann*, 999 F. Supp. 1380, 1384 (D. Mont. 1998).

13 51. "In the free society ordained by our Constitution it is not the government, but the
14 people—individually as citizens and candidates and collectively as associations and political
15 committees—who must retain control over the quantity and range of debate on public issues in a
16 political campaign." *Buckley v. Valeo*, 424 U.S. 1, 57 (1976).

17 52. In *Buckley*, the Supreme Court held that any significant encroachment on First
18 Amendment rights, such as those imposed by compelled disclosure provisions, must survive
19 exacting scrutiny, which requires the government to craft a narrowly tailored law to serve a
20 compelling government interest. *Buckley*, 424 U.S. at 64.

21 53. The Supreme Court has recognized that the principles applied in *Buckley* apply as
22 forcefully to activities surrounding the referenda process. *See Buckley v. American Constitutional*
23 *Law Foundation*, 525 U.S. 182, 192 (1999) ("[T]he First Amendment requires us to be vigilant
24 in making those judgments, to guard against undue hindrances to political conversations and the
25 exchange of ideas. We therefore detail why we are satisfied that . . . the restrictions in question
26 significantly inhibit communication with voters about proposed political change, and are not
27 warranted by the state interests (administrative efficiency, fraud detection, informing voters)
28 alleged to justify those restrictions.") (internal citations omitted); *Citizens Against Rent Control*

1 *v. Berkeley*, 454 U.S. 290, 295 (1981) (applying *Buckley*'s contribution limit analysis in the
2 context of ballot measure elections).

3 **54.** The Public Records Act, in so far as it results in the public disclosure of the names and
4 addresses of petition signers, results in compelled political speech.

5 **55.** The Supreme Court has repeatedly reaffirmed that "compelled disclosure, in itself, can
6 seriously infringe on privacy of association and belief guaranteed by the First Amendment."

7 *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2008) (quoting *Buckley*, 424 U.S. at 64.

8 **56.** To survive exacting scrutiny, the Public Records Act must be narrowly tailored to serve
9 a compelling government interest. *Buckley*, 424 U.S. at 64.

10 **57.** The burden is on the State to demonstrate that the Public Records Act is narrowly
11 tailored to serve a compelling state interest. *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d
12 1172, 1178 (9th Cir. 2007) (citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75
13 (2002)).

14 **58.** In the context of the First Amendment, the usual deference granted to the legislature
15 does "not foreclose [a court's] independent judgment of the facts bearing on an issue of
16 constitutional law." *Turner Broad. Sys. v. FEC*, 512 U.S. 622, 666 (1994) (internal citations
17 omitted). The Court's role is to ensure that the legislature "has drawn *reasonable inferences*
18 based on *substantial evidence*." *Id.* (emphasis added).

19 **59.** The Ninth Circuit recently held that compelled disclosure of *de minimis* support of a
20 referenda is unconstitutional under the First Amendment. *See Canyon Ferry Road Baptist*
21 *Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009).

22 **60.** Furthermore, even if the Public Records Act is narrowly tailored to serve a compelling
23 government interest, it remains unconstitutional because there is a reasonable probability that the
24 disclosure of the names of those individuals who signed the Referendum 71 petition will expose
25 those individuals to threats, harassment, and reprisals. *See Brown v. Socialist Workers '74*
26 *Campaign Comm.*, 459 U.S. 87 (1982) (applying the reasonable-probability test announced in
27 *Buckley*, 424 U.S. at 73).

**COUNT I – THE PUBLIC RECORDS ACT IS
UNCONSTITUTIONAL AS APPLIED TO REFERENDUM
PETITIONS**

61. Plaintiffs incorporate here by reference paragraphs one through sixty, *supra*, as if fully set forth herein.

62. The Public Records Act violates the First Amendment as applied to referendum petitions because the Public Records Act is not narrowly tailored to serve a compelling government interest.

63. WHEREFORE, Plaintiffs request the following relief:

a. Declare Wash. Rev. Code § 42.56.070 unconstitutional to the extent that it requires the Secretary of State to make referendum petitions submitted to the Secretary of State's office available to the public;

b. Enjoin Defendants from making referendum petitions available to the public pursuant to the Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.*, or otherwise;

c. Grant Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington their costs and attorneys fees under 42 U.S.C. § 1988 and any other applicable authority; and

d. Any and all other such relief as may be just and equitable.

**COUNT II – THE PUBLIC RECORDS ACT IS
UNCONSTITUTIONAL AS APPLIED TO THE REFERENDUM
PETITION BECAUSE THERE IS A REASONABLE
PROBABILITY OF THREATS, HARASSMENT, AND
REPRISALS**

64. Plaintiffs incorporate here by reference paragraphs one through sixty, *supra*, as if fully set forth herein.

65. In the alternative, the Public Records Act is unconstitutional as applied to the Referendum 71 petition because there is a reasonable probability that the signatories of the Referendum 71 petition will be subjected to threats, harassment, and reprisals.

66. WHEREFORE, Plaintiffs request the following relief:

a. Declare Wash. Rev. Code § 42.56.070 unconstitutional to the extent that it requires the Secretary of State to make the Referendum 71 petition, or any petition related to the definition or marriage or the rights and responsibilities that should be accorded to same-sex

1 couples, submitted to the Secretary of State's office available to the public;

2 **b.** Enjoin Defendants from making the Referendum 71 petition, or any petition related to
3 the definition of marriage or the rights and responsibilities that should be accorded to same-
4 sex couples, available to the public pursuant to the Public Records Act, Wash. Rev. Code §
5 42.56.001 *et seq.*, or otherwise;

6 **c.** Grant Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington their costs
7 and attorneys fees under 42 U.S.C. § 1988 and any other applicable authority; and

8 **d.** Any and all other such relief as may be just and equitable.
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VERIFICATION

I SWEAR (OR AFFIRM) UNDER THE PENALTIES FOR PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING STATEMENTS CONCERNING ME IN THIS COMPLAINT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND UNDERSTANDING.

Dated this 28th day of July, 2009.

Larry Stickney

1 Dated this 28th day of July, 2009.

2 Respectfully submitted,

3
4 James Bopp, Jr. (Ind. Bar No. 2838-84)*
5 Sarah E. Troupis (Wis. Bar No. 1061515)*
6 Scott F. Bieniek (Ill. Bar No. 6295901)*
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**Pro Hac Vice Application Pending*

APPENDIX B

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8 **UNITED STATES DISTRICT COURT**
9 **WESTERN DISTRICT OF WASHINGTON**
10 **SEATTLE DIVISION**

11 JOHN DOE #1, an individual, JOHN DOE #2,
12 an individual, and PROTECT MARRIAGE
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13 Plaintiffs,

14 vs.

15 SAM REED, in his official capacity as
Secretary of State of Washington, DEBRA
16 GALARZA, in her official capacity as Public
Records Officer for the Secretary of State of
Washington,

17 Defendants.
18

No. _____

**Plaintiffs' Notice of Motion and Motion for
Temporary Restraining Order and
Preliminary Injunction, and Memorandum
in Support of Motion for Temporary
Restraining Order and Preliminary
Injunction**

NOTE ON MOTION CALENDAR: [DATE]

ORAL ARGUMENT REQUESTED

TO DEFENDANTS AND THEIR ATTORNEY(S) OF RECORD:

YOU ARE HEREBY GIVEN NOTICE THAT on A DATE TO BE DETERMINED BY COURT ORDER, before a JUDGE TO BE DETERMINED in Courtroom TO BE DETERMINED BY COURT ORDER of the United States District Court for the Western District of Washington, Seattle Division, located at 700 Stewart Street, Seattle, Washington 98101, Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington, will and hereby do move for a temporary restraining order and preliminary injunction against Defendants.

This motion for temporary restraining order and preliminary injunction is made pursuant to Fed. R. Civ. P. 65, and on the grounds specified in this Notice of Motion and Motion, and Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, the documents filed in support thereof, the Verified Complaint, and such other and further evidence as may be presented to the Court at the time of the hearing.

Pursuant to this notice, Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington do hereby move for a preliminary injunction to:

- (1) Enjoin Defendants from making referendum petitions available to the public pursuant to the Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.*, or otherwise;
- (2) Enjoin Defendants from making the Referendum 71 petition or any petition related to the definition of marriage or the rights and responsibilities that should be accorded to same-sex couples, available to the public pursuant to the Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.*, or otherwise.

In support thereof, Plaintiffs present the following Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction.

I. INTRODUCTION

Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington seek a temporary restraining order and preliminary injunction to prevent Defendant Sam Reed, Secretary of State for the State of Washington, and Defendant Debra Galarza, the Public Records Officer for the Secretary of State of Washington, from releasing copies of the Referendum 71 petition pursuant to the Washington Public Records Act, Wash. Rev. Code § 42.56.001, or otherwise.